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SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1956

No. 52

MYRON WIENER, PETITIONER,

*vs.*

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 8, 1956
CERTIORARI GRANTED JANUARY 21, 1957

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1956

# No. 615

MYRON WIENER, PETITIONER,

*vs.*

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. 1] **IN THE UNITED STATES COURT OF CLAIMS**

No. 337-54

MYRON WIENER

v.

THE UNITED STATES OF AMERICA

PETITION—Filed August 20, 1954

To the Honorable United States Court of Claims:

The Petition of Myron Wiener, the plaintiff, by his attorney, I. H. Wachtel, respectfully shows and alleges as follows:

1. Jurisdiction is conferred upon this Court by Sections 1346 and 1491, Title 28, of U.S. Code.

2. The plaintiff is a citizen of the United States of America and is admitted to the Bar of the highest Court of the District of Columbia, the State of New York and the State of California.

3. The War Claims Commission (hereinafter also referred to as "Commission"), an independent body com-
[fol. 2] posed of three members—commissioners, appointed by the President with the advice and consent of the United States Senate, was created by the Congress by the War Claims Act of 1948, as amended, (62 Stat. 1240, 50 U.S.C.A., App. 2001-2013) hereinafter also referred to as the "Act" to carry into effect the legislative policies embodied in the aforesaid Act in accordance with the legislative standards therein prescribed and to perform as a legislative and/or judicial aid, among other things, the following duties and functions:

> A. Prescribe such rules and regulations as may be necessary to enable the Commission to carry out its functions and to delegate its functions to any member, officer or employee of the Commission, to give public notice of the time when and to limit the time within which, claims of the nature set forth in said Act may

be filed, to advise all persons entitled to file claims under the provisions of said acts of their rights thereunder and to assist them in the preparation and filing of their claims.

B. To receive and adjudicate according to law the claims described in said Act.

C. To receive and adjudicate according to law and provide for the payment of any claim filed by or on behalf of any civilian American citizen for detention benefits in accordance with the provisions of Section 5 of said Act and to certify to the Secretary of the Treasury for the payment out of the War Claims Fund established by said Act any such claims allowed by the Commission.

D. To receive and adjudicate according to law and to provide for the payment of any claim filed by any prisoner of war in accordance with the provisions of Section 6 of said Act and to certify to the Secretary of the Treasury for payment out of the War Claims Fund established by said act any such claims allowed by the Commission.

[fol. 3] E. To receive and adjudicate according to law and to provide for the payment of any claims filed by certain religious organizations in accordance with the provisions of Section 7 of said Act and to certify to the Secretary of the Treasury for the payment out of the War Claims Fund established by said Act any such claim allowed by the Commissioner.

F. To notify all claimants of the approval or denial of their claims and, if approved, notify such claimants of the amounts for which such claims are approved. And under regulations prescribed by the Commission afford a claimant a hearing before the Commission or its representatives with respect to any such claim and upon such hearing to affirm, modify or revise its former action with respect to any such claim including a denial or reduction in the amount theretofore allowed with respect to such claim.

G. The action of the Commission in allowing or denying any claim was to be final and conclusive on all questions of law and fact and not subject to review by any

other officials of the United States or by any Court, by mandamus, or otherwise.

H. Inquire into and report to the President for submission of such report to the Congress with respect to war claims arising out of World War II, other than claims which may be received and adjudicated under the other provisions of the Act and present in such report the Commission's:

(1) Findings on the estimated number and amount of such claims, classified by types and categories and the extent to which such claims have been or may be satisfied under international agreements or domestic or foreign laws, and;

[fol. 4] (2) Recommendations to the Congress with respect to (a) categories and type of claims, if any, which should be received and considered and the legal and equitable bases therefor: (b) the administrative method by which such claims should be considered and any priorities or limitations which should be applicable; (c) any limitations which should be applied to the allowances and payment of fees in connection with such claims; (d) such other recommendations as the Commission deems appropriate; and (e) such proposals for legislation, as the Commission deems appropriate for carrying out the recommendations made in such report.

(3) Said report when submitted to the Congress was required to be printed as a public document and was in fact transmitted to Congress by the Commission on May 3 1950 and printed as House Document No. 580, 81st Congress, 2nd Session.

(4) Not later than six months after its organization and every six months thereafter the Commission was required to make a report to the Congress concerning its operation under the Act.

I. For the purpose of any hearing, examination or investigation required under the said Act, the Commission was authorized to issue subpoenas requiring persons to appear and testify and to appear and produce documents or both and upon the application of a claim-

ant to issue to such claimant subpoena requiring the appearance and testimony of witnesses or the production of documents or both. In the event of the failure or refusal on the part of any person to comply with any subpoena to invoke the aid of the U. S. District Court within the jurisdiction of which the hearing, examination or investigation is being conducted or such claim- [fol. 5] ant resides or transacts business. To administer or take from any person an oath, affirmation or affidavit when such action is necessary or appropriate in the performance of the functions or activities of the Commission.

4. The terms of office of the members of the Commission were to expire only at the time fixed in Section 2 of the Act, as amended, for the winding up of the affairs of the Commission. The Commission was required to wind up its affairs at the earliest practicable time after the expiration of the time for filing claims but in no event later than three years after the expiration of such time. Public Law 16, 82nd Congress, approved April 5, 1951, provided that the limit of time within which claims may be filed with the Commission shall in no event be later than March 31, 1952.

5. The Plaintiff was duly appointed a member—commissioner, of the War Claims Commission by Harry S. Truman, as President of the United States of America, with the advice and consent of the United States Senate and took the constitutional oath of office applicable thereto on or about June 8, 1950, and thereupon entered upon his duties. From said date up to and including December 10, 1953, the Plaintiff duly performed all of his duties as a member—commissioner of the War Claims Commission, and continues to hold himself ready and available to perform the duties of said office.

6. On December 10 1953, the Commission had not wound up its affairs nor had the limit of time fixed by the Act for the winding up of the affairs of the Commission yet expired. On December 10, 1953, there was only one vacancy in the member—commissioners of the Commission, to wit: Daniel [fol. 6] E. Cleary, deceased.

7. On December 10, 1953, the Plaintiff received from the

President a communication, dated December 10, 1953, purporting to remove the Plaintiff as a member—commissioner of the War Claims Commission, as more fully appears from a true copy thereof, designated Exhibit A, attached hereto and made part hereof as if fully set forth herein. On December 14, 1953, the Plaintiff notified the President in writing that he lacked the legal or constitutional authority to remove the Plaintiff herein and that the Plaintiff holds himself available and ready to perform the duties of his office, as more fully appears from a true copy thereof designated Exhibit B attached hereto and made part hereof as if fully set forth herein.

8. The aforesaid removal of the Plaintiff by the President was in violation of, and in contravention of law and exceeded his legal and constitutional authority and therefore was null and void and of no force and effect.

9. On December 10, 1953, Dwight D. Eisenhower, President of the United States of America, while the Congress was in recess, appointed as members of the War Claims Commission, Raymond T. Armbruster, Whitney Gilliland and Mrs. Pearl Carter Pace. Thereafter, on or about February 15, 1954, six weeks after the reconvening of Congress, the President sent to the Senate of the United States the nominations of Raymond T. Armbruster, Whitney Gilliland, and Mrs. Pearl Carter Pace to be members of the War Claims Commission. The Senate of the United States has neither confirmed nor given its advice and consent to ap- [fol. 7] pointments of said Raymond T. Armbruster, Whitney Gilliland and Mrs. Pearl Carter Pace.

10. The appointments and nomination of Raymond T. Armbruster, Whitney Gilliland and Mrs. Pearl Carter Pace by the President of the United States was in violation of, and in contravention of law and exceeded his legal and constitutional authority and is null and void and of no force and effect.

11. On June 30, 1954, the War Claims Commission was abolished in manner provided for in the Reorganization Act of 1949 (5 U.S.C. 1332-9) and all of the functions of the War Claims Commission and of the members thereof transferred to the Foreign Claims Settlement Commission of the United States.

12. That as a result of all of the foregoing the Plaintiff was prevented from performing the duties imposed by said Act from December 10, 1953 through June 30, 1954 and failed to receive the compensation and emoluments provided by law in the amount of $8,254.00.

WHEREFORE, the plaintiff respectfully prays that this Honorable Court grant judgment against the defendant in favor of Plaintiff in the amount of $8,254.00, together with interest thereon and such other relief as may be just and proper.

I. H. Watchtel, Attorney for the Plaintiff, 917-15th Street, N. W., Washington, D. C.

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[fol. 8] EXHIBIT A TO PETITION

THE WHITE HOUSE
Washington

December 10, 1953

DEAR MR. WIENER:

I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection. To that end, Mr. C. F. Willis, Jr., of my staff transmitted my wish that you and your associate resign your commissions. I understand from Mr. Willis that you are unwilling to do so.

Accordingly, effective as of December 11, 1953, you are hereby removed from the office of Member of the War Claims Commission.

Sincerely, (S.) Dwight D. Eisenhower.

The Honorable Myron Wiener, Member, War Claims Commission, Tariff Commission Building, Seventh and E Streets, Washington, D. C.

EXHIBIT B TO PETITION

WAR CLAIMS COMMISSION
Washington 25, D. C.

December 14, 1953.

The President, The White House, Washington, D. C.

DEAR MR. PRESIDENT:

I have your letter of December 10, 1953, in which you state that, effective as of December 11, 1953, I am removed [fol. 9] from the office of Member of the War Claims Commission in order that you may appoint personnel of your own selection. I deny unequivocally your right and power to take such action.

While the exigencies of party politics and political commitments may make certain demands, I do not believe such circumstances should afford The President a basis for ignoring the Congressional mandate to each member of the Commission to assist the Congress in performing its traditional legislative functions of investigation and the judicial determination of the rights of innocent victims of World War II to relief under an Act of Congress.

The War Claims Act of 1948, as amended, was enacted by the Congress out of a strong conviction, having no relation to political considerations, to compensate in some measure American prisoners of war and others described in the law, for pain, suffering and tremendous financial loss caused by World War II. With that view in mind, and without regard for political advantage or sectional self-interest, the Congress authorized the establishment of a Commission to serve for a fixed term of years, to carry out without regard to partisan consideration or pressure what the Congress believed to be the country's obligation to do justice to an unfortunate segment of our population. The Members of the Commission have from the day of their appointment performed their duties in the secure knowledge that their sole responsibility was to make the investigations required to aid the Congress and to do justice and equity according to law to all who appeared before it. The duty to

adjudicate the rights granted by law transcends any sense of obligation to the appointing authorities and requires a dedicated adherence to the constitutional oath of office and the principles of justice, which can best exist in an atmosphere of certainty in tenure of office.

I take issue with the implications in your letter that only personnel of your selection can perform in the national interest.

[fol. 10] There are compelling and persuasive reasons why I must resist in the manner provided by law this attempt to remove me from office. Long before I took the constitutional oath of office as an official of the United States of America, I took an oath as a member of the Bar to uphold the Constitution and the laws of the United States. As such, and as a free citizen of the greatest democracy in the world, I feel it my duty as a matter of principle to prevent a violation of our country's laws. To do otherwise would be to acquiesce in the commission of an act and the creation of a precedent which could seriously impinge on the basic concept of the separation of powers on which this country was founded.

I regret, Mr. President, that I am compelled to advise you that within the limits of my capabilities, I shall continue to resist and deny the legality of your notice of removal and the appointment of new commissioners and their right to act and perform the functions set forth in the War Claims Act of 1948, as amended, and that in accordance with the orderly processes of law, will take such action as is therein provided to obtain an adjudication of the legality and propriety of your action. Meanwhile, I consider myself to be a Member of the War Claims Commission and shall hold myself in readiness to perform the duties of that office.

Respectfully, Myron Wiener.

[fol. 11] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ANSWER—Filed November 18, 1954

Defendant, for answer to the petition filed herein, as a First Defense to Plaintiff's Cause of Action, alleges as follows:

1. Asserts that the allegations contained in paragraph 1 of the petition are conclusions of law, which the defendant needs neither to admit nor deny, but if they be deemed allegations of material facts, they are denied.

2. Defendant's attorney has been unable to obtain knowledge or information sufficient to form a belief with respect to the allegations contained in paragraph 2 of the petition, which allegations accordingly are denied.

3. Admits the allegations contained in paragraph 3 of the petition that the War Claims Commission as created by the War Claims Act of 1948 (62 Stat. 1240) was com-
[fol. 12] posed of three persons appointed by the President by and with the advice and consent of the Senate, said Commission to perform the duties and functions set forth in said statute. Defendant alleges that the remaining allegations contained in paragraph 3 of the petition either are conclusions of law which the defendant needs neither to admit nor deny, or are references to statutory law which speak for themselves. Accordingly, defendant denies the allegations contained in paragraph 3 of the petition, except as admitted above.

4. In answer to the allegations contained in paragraph 4 of the petition, defendant admits that section 2 of the War Claims Act of 1948 made provision for the expiration of the terms of office of Members of the War Claims Commission and provided that the Commission wind up its affairs at the earliest practicable time after the expiration of time for filing claims but in no event later than three years after the expiration of such time. Defendant further admits that Public Law 16, 82d Congress, approved April 5, 1951, 65 Stat. 28, amended the War Claims Act of 1948 by providing that the limit of time within which claims may be filed with

the Commission shall in no event be later than March 31, 1952. Defendant asserts that the remaining allegations contained in paragraph 4 of the petition are conclusions of law, which defendant needs neither to admit nor deny, but if they be deemed allegations of material facts, they are denied.

5. In answer to the allegations contained in paragraph [fol. 13] 5 of the petition, defendant admits that on June 8, 1950, Harry S. Truman, then President of the United States of America, nominated, and, by and with the advice and consent of the Senate, appointed plaintiff a Member of the War Claims Commission, subject to the conditions prescribed by law, and that plaintiff took his oath of office and entered upon the duties of the office of Member of the War Claims Commission on or about June 8, 1950. Defendant admits that plaintiff continued to occupy said office until December 11, 1953. Defendant alleges that on December 10, 1953, Dwight D. Eisenhower, President of the United States, lawfully, properly and in the valid exercise of his constitutional power and authority as President of the United States removed said plaintiff, Myron Wiener, from the office of Member of the War Claims Commission, effective as of December 11, 1953, said plaintiff having refused to resign at the express wish of the President. Said removal was regarded by the President as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of the President's own election, as is shown by Exhibit A to the petition filed herein. Except to the extent admitted by the foregoing statements, the allegations contained in paragraph 5 of the petition are denied.

6. In answer to the allegations contained in paragraph 6 of the petition, defendant admits that on December 10, 1953, the Commission had not wound up its affairs nor had [fol. 14] the limit of time fixed for the winding up of the affairs of the Commission expired. Defendant admits that on December 10, 1953, there was one vacancy in the War Claims Commission resulting from the death of Daniel W. Hoan, Chairman of said Commission, on December 3, 1953, and defendant alleges that on December 11, 1953 there were two vacancies on the Commission, the two additional

vacancies resulting from the lawful, valid, and constitutional removal by the President of plaintiff and Georgia L. Lusk. Except to the extent admitted by the foregoing statements the allegations contained in paragraph 6 of the petition are denied.

7. In answer to the allegations contained in paragraph 7 of the petition, defendant admits that on December 10, 1953, plaintiff received from the President of the United States a communication dated December 10, 1953, lawfully, properly and in the valid exercise of his constitutional power and authority as President of the United States, removing plaintiff from the office of member of the War Claims Commission, as more fully appears in a copy thereof attached to the petition as Exhibit A. Defendant also admits that the plaintiff sent a communication to the President dated December 14, 1953, copy of which is attached to the petition as Exhibit B. Defendant denies the remaining allegations contained in paragraph 7 of the petition.

8. Denies the allegations contained in paragraph 8 of the petition.

9. In answer to the allegations contained in paragraph 9 [fol. 15] of the petition, defendant admits that the President, while the Congress was in recess, on December 11, 1953, properly and lawfully appointed Raymond T. Armbruster, Whitney Gillilland and Mrs. Pearl Carter Pace, Members of the War Claims Commission during the pleasure of the President of the United States, for the time being and until the end of the next session of the Senate of the United States and no longer. Defendant further admits that upon the reconvening of the Congress, the President of the United States, on February 15, 1954, sent to the Senate of the United States the nominations of Raymond T. Armbruster, Whitney Gillilland and Mrs. Pearl Carter Pace, to be Members of the War Claims Commission, and that the Senate of the United States did not confirm said appointments by the date of abolition of the War Claims Commission. Except to the extent admitted by the foregoing statements, the allegations contained in paragraph 9 of the petition are denied.

10. Denies the allegations contained in paragraph 10 of the petition.

11. In answer to the allegations contained in paragraph 11 of the petition, defendant admits that on July 1, 1954, Reorganization Plan No. 1 of 1954 (19 F.R. 3985) prepared in accordance with the Reorganization Act of 1949, as amended (5 U.S.C. 133z to 133z-15) became effective and that Reorganization Plan No. 1 of 1954 provided that the War Claims Commission, including the offices of the Members of said Commission, was abolished and all functions of the War Claims Commission and of the members, officers [fol. 16] and employees thereof transferred to the Foreign Claims Settlement Commission of the United States. Defendant denies the remaining allegations contained in paragraph 11 of the petition.

12. In answer to the allegations contained in paragraph 12 of the petition, defendant admits that because of the lawful removal of plaintiff from the office of Member of the War Claims Commission on December 11, 1953, plaintiff performed no duties thereafter and received no compensation from the defendant for services performed since that date, save that defendant asserts that an annual leave lump sum payment for 428 hours was paid plaintiff, in the amount of $3,309.41. Defendant denies the remaining allegations contained in paragraph 12 of the petition.

13. Denies each and every allegation in the petition not heretofore specifically admitted, denied or qualified.

As and for a Second Defense to plaintiff's petition, defendant asserts the defense of *res judicata* under Rule 15b and alleges as follows:

14. In an action brought by plaintiff in the District Court of the United States for the District of Columbia on the same claim as that set forth in the petition, a final judgment was rendered for the defendant dismissing the action on the merits.

[fols. 17-30] WHEREFORE, defendant prays that the petition be dismissed with costs assessed against the plaintiff.

Warren E. Burger, Assistant Attorney General, Civil Division; Walter Kiechel, Jr., Attorney, Civil Division, Department of Justice.

[fol. 31-32] MINUTE ENTRY OF ARGUMENT AND SUBMISSION OF CASE—May 3, 1956 (omitted in printing)

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[fol. 33] IN THE UNITED STATES COURT OF CLAIMS

No. 337-54

MYRON WIENER

v.

THE UNITED STATES

Mr. I. H. Wachtel for plaintiff.

Mr. Walter Kiechel, Jr., with whom was Mr. Assistant Attorney General George Cochran Doub, for defendant. Mr. Gerson B. Kramer was on the briefs.

OPINION—July 12, 1956

MADDEN, Judge, delivered the opinion of the court:

On June 8, 1950, the plaintiff was appointed a member of the War Claims Commission, to serve during the life of the Commission, which was to expire not later than March 31, 1955. On December 10, 1953, the plaintiff was removed by the President, and another person was appointed in his stead. The plaintiff alleges the President had no authority to remove him, and that he was at all times ready, willing, and able to perform the duties of his office. He sues for the salary he would have earned had he not been removed.

The President's power to remove has been considered by the Supreme Court in two fairly recent leading cases. In *Myers* v. *United States*, 272 U. S. 52, that court set forth the doctrine that the President has the inherent power to discretionarily remove an official or officer appointed by him and confirmed by the Senate, even though the appointment is for a fixed term, and even though the Act creating the office provided for removal for stated causes. However, in *Humphrey's Executor* v. *United States*, 295 U. S. 602, the court, after limiting the broad scope of the *Myers* case to purely executive officers, held that the President may not at

[fol. 34] his discretion remove an official who is a member of a quasi-legislative or quasi-judicial agency, when the Act creating the agency fixes a definite term of office and provides for removal for stated causes.

Hence, the first question we must consider is whether the War Claims Commission was a part of the executive branch of the Government. If this question is answered in the affirmative, then under the doctrine of the *Myers* case, there can be no doubt that the President had the power to discretionarily remove the plaintiff. If, on the other hand, it is determined that the War Claims Commission acted in a quasi-legislative or quasi-judicial capacity, the court must then determine whether the present case falls within the scope of the *Humphrey* decision.

Did the War Claims Commission exercise power predominantly legislative or judicial in character, or was it a part of the executive branch of the Government? If the latter, the President clearly had the power of removal.

The War Claims Commission was created by the War Claims Act of 1948, 62 Stat. 1240, 50 U. S. C. App. sec. 2001 *et seq.* Section 5 (b) of this Act provided for the adjudication of the claims of American citizens for detention benefits. It reads:

> The Commission is authorized to receive, adjudicate according to law, and provide for the payment of any claim filed by, or on behalf of, any civilian American citizen for detention benefits for any period of time subsequent to December 6, 1941, during which he was held by the Imperial Japanese Government as a prisoner, internee, hostage, or in any other capacity, or remained in hiding to avoid being captured or interned by such Imperial Japanese Government.

Section 6 (b) of the Act provided for the adjudication of claims of prisoners of war. It reads:

> The Commission is authorized to receive, adjudicate according to law, and provide for the payment of any claim filed by any prisoner of war for compensation for the violation by the enemy government by which he was held as a prisoner of war, or its agents, of its obligation to furnish him the quantity or quality of food to which

he was entitled as a prisoner of war under the terms of the Geneva Convention of July 27, 1929. The com- [fol. 35] pensation allowed to any prisoner of war under the provisions of this subsection shall be at the rate of $1 for each day he was held as a prisoner of war on which the enemy government or its agents failed to furnish him such quantity or quality of food. * * *

Section 7 provided for the adjudication of claims by religious organizations. It reads:

> The Commission is authorized to receive, adjudicate according to law, and provide for the payment of any claim filed by any religious organization functioning in the Philippine Islands and affiliated with a religious organziation in the United States, or by the personnel of any such Philippine organization, for reimbursement of expenditures incurred, or for payment of the fair value of supplies used, by such organization or such personnel for the purpose of furnishing shelter, food, clothing, hospitalization, medicines and medical services, and other relief in the Philippines to members of the armed forces of the United States or to civilian American citizens (as defined in section 5) [section 2004 of 50 USC Appendix] at any time subsequent to December 6, 1941, and before August 15, 1945. * * *

Section 11 gave the claimant the right to a hearing of his claim and made the decision of the Commission "final and conclusive on all questions of law and fact and not subject to review *by any other official* of the United States or *by any court by mandamus or otherwise* * * *." (Italics supplied.)

By Section 2(d) (64 Stat 449) the Commission was given the power to issue subpoenas and to administer oaths to witnesses.

All of the foregoing are powers such as are vested in courts of justice. In the performance of such duties the Commission was acting in a quasi-judicial capacity; or, perhaps, as an agent of Congress in discharge of the congressional obligation "to pay the Debts of the United States." Certainly in so doing it was not performing an executive function.

It is true that such powers are from time to time conferred on executive agencies, and the exercise of such powers does not make such agencies a part of the judicial branch of the Government. This is because the function of such agencies is primarily executive, and the performance of duties judicial in nature is incidental or ancillary to the discharge of their executive duties. But the War Claims Commission was [fol. 36] clothed with no executive powers. The powers conferred on it, to which we have heretofore referred, were wholly judicial, or, perhaps, legislative in character.

Other duties were also put upon the Commission, but they were not of an executive but of a legislative nature.

The claims provided for in the foregoing sections consisted of claims of civilian internees, prisoners of war, or of religious bodies. They were to be paid out of a War Claims Fund, made up of the proceeds of enemy property seized by the Alien Property Custodian. It was recognized that there were many other classes of claims, but no provision was made for their payment. However, in section 8 the Commission was directed to make a survey of these other claims and to report to Congress: (1) on the number and amount of them, classified by types and categories, and (2) the extent to which they might be settled by international agreement. The Commission was also directed to recommend (1) the types of claims that should be received and considered, supported by a statement as to the legal or equitable basis for their possible allowance, and (2) the method by which these claims should be considered, and the limitation of time that should be fixed for the filing of such claims. The Commission was also directed to draft a bill to be introduced in Congress to carry out its recommendations. There can be no doubt that in discharging this function the Commission acted as an agent of the Congress.

The fact that this report was to be submitted to the President is of no significance. It was to be submitted to him "for submission of such report to the Congress." The President was not requested to comment on the report; his sole function was to transmit it. He was no more than the depository designated to receive the report and to transmit it to the Congress. Presumably it was to be submitted to him only to take care of the eventuality that Congress might

have adjourned *sine die* at the time the Commission was ready to report.

Under section 9, the Commission was directed to make a report of its operations *to the Congress*. These reports were to cover the discharge of all the duties cast upon it, to wit, the adjudication of claims, and the survey of other claims the adjudication of which was not provided for, [fol. 37] preliminary to a recommendation for their disposition, and such recommendation.

Nowhere in the Act is there cast upon the Commission the discharge of any executive function. All its functions were of a nature either judicial or legislative.

We must next determine whether the removal of a member of such a commission is within the scope of the *Humphrey* decision.

The Federal Trade Commission Act, which was involved in the *Humphrey* case, provided that each commissioner appointed to the Federal Trade Commission by the President should continue in office for a definite number of years, but that any commissioner could "be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The President requested Humphrey to resign from his position as commissioner and, when Humphrey refused to do so, the President removed him from office without assigning any cause therefor. Humphrey's executor sued in this court to recover the salary which was lost by reason of the removal. The case was certified by this court to the Supreme Court. That Court determined that the Federal Trade Commission was quasi-legislative and quasi-judicial in nature and not a part of the executive branch of the Government, and held that the President may not within his discretion remove an official of such an agency when the act creating the agency fixes a definite term of office and specifies causes for which the President may remove.

From the following language which appears at the conclusion of the *Humphrey* opinion, 295 U. S. at 632, it appears that the Supreme Court intended to limit the scope of the *Humphrey* decision to the precise situation then before it:

> To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our

present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

[fol. 38] The Constitution is silent as to the power of the President to remove officials appointed by him. These voluminous opinions in the *Myers* case, and in the *Humphrey* case, give the details of the executive and congressional action, and the decisions of the courts, on this question, 'throughout our history.' The *Humphrey* decision showed that there had been a change in the attitude of the Supreme Court since the *Myers* decision. The case which we have to decide is different from both *Myers* and *Humphrey*. It resembles *Humphrey* in that the functions of the plaintiff's office were not executive, but quasi-judicial and quasi-legislative. But it differs from *Humphrey* in the important respect that Congress, in creating the War Claims Commission, did not place any limitation upon the President's power of removal.

If we pass over earlier periods in our history, including the period of conflict between Congress and President Johnson, and limit ourselves to relatively recent history, we find that in 1921, in the enactment of the Budget and Accounting Act, 42 Stat. 23, 31 U.S.C. 43, Congress placed limitations on the President's power to remove the Comptroller General. It provided stated grounds on which he might be removed and then said that he could be removed "for no other cause and in no other manner except by impeachment." In 1926, Congress, in creating the National Mediation Board, 44 Stat. 579, 45 U.S.C. 154, provided that a member of the Board might be "removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause." In 1935, in the National Labor Relations Act, 49 Stat. 451, 29 U.S.C. 153(a), Congress created a Board whose functions would be largely quasi-judicial, and used substantially the same form of words as in the act creating the National Mediation Board.

In the Act of June 29, 1936, creating the United States Maritime Commission, 49 Stat. 1985, 46 U.S.C. 1111(a), Congress said "Any member may be removed by the Presi-

dent for neglect of duty or malfeasance in office." The Act of June 23, 1938, 52 Stat. 980, 49 U.S.C. 421, creating the Civil Aeronautics Board, used similar language as did also the Act of August 1, 1946, 60 Stat. 756, 42 U.S.C. 1802(a)(2) creating the Atomic Energy Commission.

[fol. 39] The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70b (b) provided that the members of the Commission should hold office during good behavior until the dissolution of the Commission, as thereinafter provided, and could "be removed by the President for cause after notice and opportunity to be heard."

The Act of September 23, 1950, 64 Stat. 997, 50 U.S.C. 791 (a) creating the Subversive Activities Control Board again used the careful language, including the words, "but for no other cause" used in the earlier acts creating the office of the Comptroller General, the National Mediation Board, and the National Labor Relations Board.

It seems to us that Congress, having used various forms of language in earlier and later important statutes, might have been expected to use some form of expression indicating its intent, whenever it intended to limit the President's power. But in the statute creating the War Claims Commission, 62 Stat. 1240, 50 U.S.C. App. 2001, Congress did not even use the unclear language which was the subject of litigation in the *Humphrey* case. It provided in subsection (c) that claims could be filed with the Commission no later than March 31, 1952, and in subsection (e) that the Commission should wind up its affairs no later than three years after the last date for filing claims.

Taking the case in its aspect most favorable to the plaintiff, we have an officer appointed to perform quasi-judicial and quasi-legislative functions, and for a term certain or which can be made certain. If the President had not the unlimited power to remove him, he could not be removed at all except by impeachment, since the statute stated no limited grounds upon which the President might remove him. We do not think that Congress had any such intent. To impose upon itself the obligation to resort to the cumbersome, time-consuming and rarely used method of impeachment would be a serious step indeed. If Congress had intended that the President should not have the unlimited power of

removal, it would most certainly have provided him with a limited power which would relieve Congress of the intolerable burden of an impeachment proceeding. Even in the case of Federal judges, constitutionally assured of tenure during good behavior, there is a recurring search in Congress for the discovery of some method which might be [fol. 40] permitted by the Constitution, of removing them for cause without the uncertain and harrowing experience of an impeachment proceeding.

Furthermore, we do not think that the asserted certain term of office, which is all that the plaintiff can find in the statute to rely on, shows an intent that the appointee should be irremovable. In its context, it seems to us to say that the Commission, from the time of its creation, must plan its work so that it will not have unfinished business when the expiration date occurs, because Congress does not intend to extend its life. The language seems to us to have been used, not to protect the members of the Commission in their tenure, but to protect the Treasury and the public against the perpetuation of an agency which was meant to be temporary.

The Supreme Court, in *Shurtleff* v. *United States*, 189 U.S. 311, 315, 316, said:

> To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication. • • • The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away.

The Supreme Court found in the *Humphrey* case a Congressional intent, shown by the statutory language and the legislative history, to limit the President's power. That decision no doubt tempered the strict doctrine stated in the *Shurtleff* case. But it did not discard it to the extent that a court should conclude that the President's power had been

abrogated even though there was no evidence at all, or substantially no evidence, that Congress so intended. There is no evidence whatever of any such intent in relation to the statute under construction in the instant case.

Plaintiff's petition is dismissed.

It is so ordered.

LARAMORE, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

[fol. 41] WHITAKER, Judge, dissenting:

The italicized part of the following quotation from the majority opinion points up the difference between my view and theirs:

> The case which we have to decide is different from both *Myers* and *Humphrey*. It resembles *Humphrey* in that the functions of the plaintiff's office were not executive, but quasi-judicial and quasi-legislative. *But it differs from Humphrey in the important respect that Congress, in creating the War Claims Commission, did not place any limitation upon the President's power of removal.*

The majority says that the President had the power to remove members of the War Claims Commission because Congress did not limit his power of removal; I say he has no power of removal of a quasi-legislative or quasi-judicial officer unless Congress confers this power on him. I say it is not a matter of limiting the President's power, because he did not have such power to begin with. If the power is not conferred by Congress, then the power does not exist.

I think this is the principle underlying the *Humphrey* decision. In that decision the Supreme Court said that the President could not remove a member of the Federal Trade Commission except for such cause as was specified by Congress, but in the *Myers* decision they had said that the President's power to remove a person in the executive department could not be limited by Congress. In other words, as to an executive officer, the power of removal is inherent in the office of President, but as to a quasi-legislative officer, there is no such inherent power, and, hence, the President possesses only such power as Congress confers on him.

There is no other way to harmonize the *Myers* and *Humphrey* decisions.

Such a distinction is compelled, I think, by the constitutional concept of the separation of powers between the executive and the legislative and judicial branches of the Government. The Constitution intended that each should be supreme in its own field, subject only to those checks and balances specifically set forth in the Constitution. If the President has the inherent power to remove a member of a body created by Congress to perform a legislative function, then Congress is not supreme in its own field, but is subordi- [fol. 42] nate to the supreme executive power. Likewise, if he has the inherent power to remove a member of a body created to perform a quasi-judicial function, then the judicial branch is not independent, but is subordinate to the will of the executive.

Since the War Claims Commission was a part of the judicial or legislative branch of the Government, or both, the President had no power to remove the members of that Commission unless the power to do so was conferred on him by Congress. The majority does not say Congress conferred the power; it says they failed to withhold it. I say, since Congress did not confer the power, the President did not have the power.

## Findings of Fact

The court having considered the evidence, the report of Commissioner George H. Foster, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff is a citizen of the United States and is now a resident of the District of Columbia. He is a lawyer who has been admitted to practice law in the highest courts of the States of California and New York, of the District of Columbia, and the United States Court of Claims.

2. On July 3, 1948, P. L. 896 was enacted (62 Stat. 1240). This act was known as the War Claims Act of 1948. It provided in part as follows:

> Sec. 2 (a). There is hereby established a commission to be known as the War Claims Commission (hereinafter referred to as the "Commission") and to be com-

posed of three persons to be appointed by the President, by and with the advice and consent of the Senate. At least two of the members of the Commission shall be persons who have been admitted to the bar of the highest court of any State, territory, or the District of Columbia. The members of the Commission shall receive compensation at the rate of $12,000 a year. The terms of office of the members of the Commission shall expire at the time fixed in subsection (d) for the winding up of the affairs of the Commission.

* * * * * * *

(c) The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions, and may delegate functions to any [fol. 43] member, officer, or employee of the Commission. The Commission shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. The limit of time within which claims may be filed with the Commission shall in no event be later than two years after the date of enactment of this Act.[1]

(d) The Commission shall wind up its affairs at the earliest practicable time after the expiration of the time for filing claims, but in no event later than three years after the expiration of such time.

Sections 5, 6, 7, 8, and 9 of the act related to the duties of the Commission.

3. On June 8, 1950, Harry S. Truman, President of the United States, with the advice and consent of the Senate of the United States, appointed the plaintiff as a member of the War Claims Commission and authorized and empowered him to execute and fulfill the duties of that office according to law and to have and to hold the said office with all the powers, privileges and emoluments therein of right appertaining subject to the conditions prescribed by law.

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[1] By Joint Resolution of April 5, 1951 (65 Stat. 28) the date of March 31, 1952, was fixed as the final date for filing claims.

On the same date, plaintiff took the oath of office and entered upon his duties as a member of the Commission.

4. On December 10, 1953, at a time when there was one vacancy in the membership of the Commission, the plaintiff received a letter from Dwight D. Eisenhower, President of the United States, reading as follows:

> "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection. To that end, Mr. C. F. Willis, Jr., of my staff transmitted my wish that you and your associate resign your commissions. I understand from Mr. Willis that you are unwilling to do so.
>
> Accordingly, effective as of December 11, 1953, you are hereby removed from the office of Member of the War Claims Commission.

5. On December 11, 1953, while the Congress was in recess the President appointed Raymond T. Armbruster, Whitney Gillilland, and Mrs. Pearl Carter Pace, members of the War Claims Commission during the pleasure of the [fol. 44] President for the time being and until the end of the next succeeding session of the Senate and no longer.

6. On December 14, 1953, the plaintiff notified the President in writing that he, the President, lacked the legal or constitutional authority to remove the plaintiff on the grounds set forth in the letter of December 10, 1953, and objected to the action of the President and advised him that the plaintiff holds himself available and ready to perform the duties of his office.

7. Upon the reconvening of the Congress, the President, on February 15, 1954, sent to the Senate the nominations of Raymond T. Armbruster, Whitney Gillilland, and Mrs. Pearl Carter Pace to be members of the War Claims Commission. The Senate did not confirm said appointments by the date of abolishment of the War Claims Commission.

8. On July 1, 1954, Reorganization Plan No. 1 of 1954, 68 Stat. 1279, became effective by virtue of which the War Claims Commission, including the offices of the members of said Commission, was abolished and all functions of the War Claims Commission and of the members, officers, and

employees thereof, were transferred to the Foreign Claims Settlement Commission of the United States.

9. The plaintiff continued to hold himself ready and available to perform the duties as a member of the War Claims Commission up to and including June 30, 1954, but as a result of the actions of the President, he was prevented from performing the duties of a member of the Commission from December 11, 1953, to June 30, 1954.

10. Plaintiff was on December 10, 1953, receiving compensation as a member of the War Claims Commission at the rate of $14,800 per annum. If plaintiff had performed the duties of the office as a member of the War Claims Commission from December 11, 1953, to and including June 30, 1954, he would have been entitled for that period to receive from the United States compensation in the amount of $8,197.06. On December 11, 1953, plaintiff was paid by the defendant the amount of $3,309.41 as a lump-sum payment for accrued annual leave. This was payment for 428 hours of accumulated annual leave. The record does not disclose the amount of leave taken by plaintiff.

[fol. 45] 11. On February 3, 1954, there was filed, in the United States District Court for the District of Columbia, Civil Action No. 447-54, captioned *United States of America*, on relation of *Myron Wiener, petitioner*, vs. *Raymond T. Armbruster, Whitney Gillilland, Pearl Carter Pace, respondents*, in which the petitioner applied for a writ in the nature of *quo warranto*, alleging that his removal by the President was in violation and in contravention of law, and exceeded his legal and constitutional authority and, therefore, was null and void and of no force and effect. The writ was issued and hearing was had upon respondents' motion to dismiss or in the alternative for summary judgment. On March 30, 1954, Judge Edward M. Curran, United States District Judge for the District of Columbia, in accordance with his opinion of March 25, 1954, that the act of the President in removing the relator, Myron Wiener, as a member of the War Claims Commission was valid and constitutional, ordered that the writ in the nature of *quo warranto* be quashed and the action be dismissed. An appeal was taken to the United States Court of Appeals for the District of Columbia but said appeal was dismissed by stipulation of the parties inasmuch as the abolishment of the War Claims

Commission under Reorganization Plan No. 1 of 1954 had rendered the action moot.

12. Plaintiff was engaged in the practice of law in Shanghai, China, from 1931 to 1941. He left Shanghai on November 27, 1941, en route to the United States and arrived in Manila on December 2, 1941, where he was later interned by the Japanese on January 1, 1942.

13. In the summer of 1943, plaintiff was given an opportunity to be repatriated by an exchange of prisoners between the Japanese and the United States Governments. Having elected to be repatrjated, plaintiff was transported by the Japanese from the Philippines to Goa, a Portuguese colony on the west coast of India, south of Bombay. At Mormugao, a port city in the colony of Goa, the Americans were exchanged for Japanese who had been transported from the United States aboard the *Gripsholm*, a Swedish ship chartered by the War Shipping Administration on behalf of the Department of State, for the purpose of repatriation of American citizens. Upon boarding the *Grips-* [fol. 46] *holm*, plaintiff was informed that he would be expected to pay for his passage and certain documents were presented to him, including a promissory note representing the estimated cost of passage from Goa to the United States. Plaintiff protested on the grounds that he had not been previously informed that he would be obliged to pay for the passage, and secondly, that the quarters assigned him were not those normally regarded as first class. Plaintiff signed the documents tendered to him at Mormugao in the knowledge that he would have to pay his own passage to the United States.

14. The promissory note signed by plaintiff at Mormugao, Portuguese India, on October 18, 1943, for his passage to the United States was in the amount of $575. Since plaintiff was not then in possession of any money, a cash advance in the amount of $50 was made to him aboard the *Gripsholm* on October 22, 1943, for which plaintiff signed another promissory note. The advance enabled plaintiff to buy necessary supplies at the ship's canteen. On November 3, 1943, when the *Gripsholm* was at Port Elizabeth, South Africa, plaintiff was advanced an additional sum of five

pounds in South African currency to enable him to secure a blood test which he needed at that time. Plaintiff signed a promissory note for five pounds, South African currency, which was the equivalent of $20.18 in United States dollars at the then rate of exchange. On November 15, 1943, at Rio de Janeiro, plaintiff was advanced the further sum of $15 for which he signed a promissory note. The promissory note signed by plaintiff for his passage contains the following statements:

> I have received today from the Special Disbursing Officer of the Department of State on the M. S. GRIPSHOLM, Mormugao, Portuguese India, Ticket No. 16859, of a value of U. S. Dollars $575.00 for passage aboard M. S. GRIPSHOLM from Mormugao to New York, which I hereby promise to repay without interest to the Treasurer of the United States upon demand in legal tender of the United States.
>
> I understand that my obligation to repay the sum hereinabove stated will not be discharged until the Treasurer of the United States actually receives in legal tender of the United States full repayment of that sum.

The other promissory notes signed by plaintiff contain language substantially the same except for the amounts.

[fol. 47] 15. The charge to plaintiff for this passage aboard the *Gripsholm* from Mormugao to New York was subsequently reduced from $575 to $548.85. The original figure was an estimate and the final charge was computed, on completion of the voyage, by prorating equally among all passengers the total cost of operation of *Gripsholm* from Mormugao to New York. All passengers aboard the *Gripsholm* were charged the same passage and the accommodations were allotted on a humanitarian basis, taking into consideration the age, physical condition and sex of the respective passengers. The payment for the *Gripsholm* was made by the Department of State through the War Shipping Administration. The United States Government made no profit on the operation of the *Gripsholm* and the repatriation of plaintiff and others.

16. Plaintiff was informed by letter dated May 9, 1944, from its assistant chief, Accounts Branch, Division of Budget and Finance, that the State Department held for collection promissory notes executed by the plaintiff in connection with his repatriation to the United States in the total amount of $634.03, that in accordance with the terms of the notes, a check or money order drawn payable to the order of the Secretary of State should be forwarded at the earliest possible date, and that upon receipt of payment the promissory notes would be cancelled and forwarded to plaintiff. This letter was sent to plaintiff at 3710 Fillmore Street, San Francisco, California, the address given by plaintiff upon his repatriation, such address appearing on each note as plaintiff's permanent address in the United States. A second request for the payment was made upon plaintiff by the Department of State by Statement No. 13478, dated October 8, 1948.

17. Plaintiff has not paid the sum of $634.03 to the defendant.

### Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and his petition is dismissed.

[fol. 48] Proceedings Following Opinion of the Court.

On August 13, 1956, defendant filed a motion to amend the judgment.

On October 2, 1956, the court entered the following order on said motion:

### Order Amending Judgment—October 2, 1956

This case comes before the court pursuant to defendant's motion filed August 13, 1956, to amend the judgment entered in this case on July 12, 1956, so as to include a judgment for defendant on its counterclaim in the sum of $634.03 with interest. The plaintiff has not opposed this motion and, upon consideration thereof,

It Is Ordered this second day of October, 1956, that the judgment of July 12, 1956, dismissing plaintiff's petition be and the same is amended so as to include judgment for de-

fendant on its counterclaim against plaintiff in the sum of six hundred thirty-four dollars and three cents ($634.03), together with interest thereof at the rate of four percent per annum from February 9, 1955, until date of payment.

By The Court,

(S.) Marvin Jones, Chief Judge.

[fols. 49-50] On October 30, 1956, defendant filed a motion for correction of judgment.

Said motion has not been acted upon by the court to date.

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[fol. 51]. Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 52] In Supreme Court of the United States,
October Term, 1956

No. ——

Myron Wiener, Petitioner

vs.

United States of America

Order Extending Time to File Petition for Writ of Certiorari—October 3, 1956

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 8th, 1956.

Earl Warren, Chief Justice of the United States.

Dated this 3rd day of October, 1956.

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 21, 1957

[Title omitted]

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5396-7)